UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Michelle L. Kelley and Randall D. Kelley,

Charging Party,

v.

Kip Colclasure,

Respondent.

HUDALJ 05-95-0516-8
Decided: January 5, 1998

Eddie Carpenter, Esquire
For the Respondents

Konrad J. Rayford, Esquire
For the Charging Party

Before: Judge William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of a complaint filed by Michelle L. and Randall D. Kelley ("Complainants") alleging discrimination based on familial status in violation of the Fair Housing Act, as amended, 42 U.S.C. § 3601, *et seq.* ("the Act"). On April 11, 1997, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued a charge against Kip Colclasure ("Respondent") alleging that he had engaged in discriminatory housing practices in violation of 42 U.S.C. §§ 3604 (b) and (c), and 24 C.F.R. §§ 100.65 and 100.75.

A hearing was held in Springfield, Illinois, on August 5, 1997. Simultaneous post-hearing and reply briefs were due on September 26, 1997, and October 17, 1997, respectively. I granted both parties' requests for extensions of time to file their briefs. The parties timely filed their post-hearing and reply briefs by October 10, 1997, and October 31, 1997, respectively. The Secretary's Reply Brief was received by this office on November 5, 1997. This case is now ripe for decision.

Statement of Facts

1. Respondent owns a townhouse/apartment rental complex located at 1180 North Diamond Street, Jacksonville, Illinois. Assisted by his wife, Jamie Lee Colclasure, Respondent has managed the property since approximately 1985. Tr. 96, 125-26, 163-64; Respondent's Brief at 1; Secretary's Brief at 4; C.P. Ex. 7. [1]

2. Complainants Michelle and Randall Kelley are a married couple with two sons who, at the time of the hearing, were seven- and three-years old. Their younger son was born September 23, 1993. Tr. 75-76.

3. Respondent's leases are for an initial twelve-month period, followed by a month-to-month tenancy. The base rent for the pertinent units at the subject property was $315 with a $15 surcharge applicable in certain situations. Tr. 30, 43-44, 138-39, 147-48; C.P. Ex. 7 at 2-3.

4. Respondent added a surcharge of $15 whenever a child was the second resident.[2] However, with one exception, when the second or third resident was an adult, the $15 surcharge was not assessed.[3] C.P. Ex. 7 at 2-3; *see also* tr. 41-45, 126-27;

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[1]The following abbreviations are used in this decision: "Tr." followed by a number for the hearing transcript and page; "C.P. Ex." for the Charging Party's exhibit; "Respondent's Brief" for Respondent's Post-Hearing Brief (Oct. 9, 1997); and "Secretary's Brief" for Secretary's Post-Hearing Brief (Oct. 10, 1997).

[2]The following tenants paid a $15 surcharge in addition to the base rent: Linda Orr and her two children; Carol Logus, Dave Woods, and one child; Felicia Allen, her fiancé and one child; Complainants, and one child.

[3]The one exception occurred after Richard Stout moved into apartment 32, 1180 North Diamond Street, in December 1995. His six-year old son resided with him for approximately one half of the week. His monthly rent was $345 (a base rent of $330 and a $15 surcharge). Around August of 1996, Mr. Stout's adult brother moved into unit 32. At that time, Respondent increased Mr. Stout's rent by $15 to $360. Tr. 113-17, 149. However, Mr. Stout's rent was increased after Respondent was interviewed by the HUD investigator on May 2, 1996, and he became aware of the instant complaint of discrimination. Because of the likelihood that the surcharge for Mr. Stout's brother was imposed because of this pending case, I have not

Respondent's Brief at 2, ¶ 7C.

5. On September 25, 1996, Respondent told Frank Della-Penna, the HUD investigator, that he might inform female tenants that if they later had a child, he would charge an additional $15 in rent.[4] Tr. 48-49; C.P. Ex. 9 at 1, ¶ 3.

6. In December 1992, Complainants moved into Respondent's apartment building at 1180 North Diamond Street. At that time, their older son was two. The Kelleys vacated the apartment in July 1994. Throughout their tenancy Complainants' rent was $330 per month ($315 base rent plus a $15 surcharge). Tr. 76, 77, 86, 91, 107, 126-27.

7. Candy Albrecht (formerly Blackorby) was Complainants' neighbor at 1180 North Diamond Street from at least the summer of 1993 until Ms. Albrecht moved out in June or July 1994. Ms. Albrecht's and Complainants' apartments were adjacent and identical in size and amenities. Ms. Albrecht resided with a roommate; her rent was $315 a month. In April or May 1994, Ms. Kelley talked with Ms. Albrecht about their respective rents. Ms. Kelley deduced that because she had a child, she was paying $15 more than Ms. Albrecht. Complainants filed their discrimination complaint on March 1, 1995, and amended it August 26, 1996. Tr. 26, 28-30, 34, 78-80, 108; C.P. Ex. 3.

8. The Kelleys left Respondent's apartment in July 1994 to care for Mr. Kelley's sister who had medical problems. After three to four months of caring for Mr. Kelley's sister, Complainants moved to another apartment. Tr. 77, 91-92, 107.

9. Approximately 2-3 months after Complainants left Respondent's building, Ms. Kelley approached Respondent about renting a "family-style apartment," an apartment similar to a single family home. Respondent considers such an apartment to be large

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considered this surcharge as determinative of Respondent's policy.

On May 2, 1996, Respondent told the investigator, that "two married people or two people who declare that they are partners are counted as one party. A women (sic) who has a child is counted as two parties and is charged an extra $15 per month." C.P. Ex. 7 at 2-3.

[4]Although Respondent denies making this statement to the investigator (tr. 157), I do not credit his testimony. The investigator's testimony and written account were corroborated by Felicia Allen, a disinterested witness. Ms. Allen, one of Respondent's tenants, testified that immediately prior to moving in, Respondent told her that if she had another child, he would charge an additional $15. However, the record also demonstrates that Respondent did not enforce this practice. Ms. Allen had another child two weeks before vacating Respondent's apartment. Her rent did not increase. Similarly, Complainants were not assessed an additional charge after the birth of their second son. Finally, another tenant, Julie Covington, was not assessed a surcharge after her son was born more than two years after she first signed her lease. Tr. 69, 70, 72, 120-22; *see infra* finding of fact no. 6.

enough for 4 people. Prior to quoting a price, Respondent asked Complainant, "You have two children now, right?" Complainant interpreted this question to imply that Respondent would assess her an extra fee because she had children. Tr. 80-82, 87, 88, 132-33, 134. [5]

10. Ms. Kelley found her experience with Respondent to be "upsetting," and when she thinks about Respondent's surcharge, it "puts a knot in [her] stomach." Over approximately three years, she and her husband have argued "a couple of times" about the complaint and the processing of the case. Mr. Kelley was concerned that the complaint process was lengthy. Tr. 90. Shortly after finding out about the $15 surcharge, Ms. Kelley was unable to eat for a couple of days and she was unable to sleep on several occasions. Tr. 82-83, 90-91, 99-100.

Discussion

The Fair Housing Act prohibits discriminating "against any person in the terms, conditions, or privileges of. . . rental of a dwelling. . . because of. . . familial status." 42 U.S.C. § 3604(b). The Charging Party alleges that Respondent's imposition of a surcharge because of Complainant's child violated this section of the Act. The Charging Party also alleges that by statements to Complainants that the presence of children necessitated an increased rent, Respondent violated section 804(c) of the Act which prohibits the making, printing or publishing of any "statement. . . with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on. . . familial status." 42 U.S.C. § 3604(c).

The Charging Party has the burden of proving, by a preponderance of the evidence, that Respondent's actions discriminated against Complainants because of their familial status. In this case a preponderance of direct evidence establishes that Respondent intentionally discriminated against families with children in violation of 42 U.S.C. § 3604(b). *See Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990); *HUD v. Jerrard*, 2 Fair Housing-Fair

[5] Although Respondent's Reply Brief alleges that Respondent neither asked the question about Complainant's children nor quoted Complainant a rental amount, in testimony, he merely couldn't recall the specifics of his conversation with Ms. Kelley:
Q: Did you, in fact, state to Mrs. Kelley what the rent would be for that house?
A: *I can't recall* if there was a figure mentioned.
Q: Okay. What was the reason -- *if* there was... no mention of a figure?
A: The house had already been promised.... Tr. 134 (emphases added).
Moreover, when asked whether he made a remark concerning the number of children that Complainants had, he stated, "[N]ot that I *recall*." Tr. 139 (emphasis added).

Lending (P-H) ¶ 25,005 at 25,087 (HUDALJ Sept. 28, 1990).

1. The Charging Party proved that Respondent violated 42 U.S.C. § 3604(b).

Respondent contends that his $15 surcharge was not intended to single out children; rather it applied to all extra parties including children. Purportedly he carved out an exception for tenants with adult second residents who, regardless of gender, "declare[d] themselves as a couple," i.e., had a sexual relationship. He justified the surcharge policy on his assertion that, unlike adult "couples", children and "noncoupled" adults cause additional wear and tear to the property and create additional work and expense for him. He claimed that tenants who are not "a couple" will draw their own partners, thereby causing overcrowding, limited parking, and additional wear and tear by people constantly moving in and out. Based on his personal experience, he views children as inherently destructive and asserts that they always cause more damage to property than adults. Tr. 126, 127-29, 140, 144-45, 151, 153-56.

I conclude that Respondent's surcharge applied to and was intended to apply exclusively to children because he believed that children, but not adults, cause additional wear and tear to his units. I do not credit his testimony that he assessed the same surcharge against "noncoupled" adults; indeed, the record shows only one instance (after the filing of the instant Complaint) where a second adult resident was assessed the surcharge. *See* Finding of Fact No. 4. In addition, the following refutes Respondent's claim:

First, he admitted that if during a prior telephone conversation with a prospective tenant, he quoted a rental price without a surcharge, but later discovered that the individual had a roommate, he did not later assess the surcharge, regardless of whether the tenants were "a couple." *See* tr. 159.

Second, I do not credit Respondent's claim that the surcharge for "noncoupled" renters compensated for his risk of losing all signatories to a lease. He claimed that if a lone signatory shared an apartment with an "uncoupled" adult, and the lone signatory then moved out, the remaining adult might then share the apartment with another adult, with neither of them being signatories to the lease. However, he later acknowledged that this so called problem could be remedied by requiring any adult resident to sign the lease. Tr. 128-29, 145, 147. In any event, an adult signatory who moved out would still be obligated under the terms of the lease. Accordingly, Respondent's rationale for the surcharge addresses a nonexistent problem.

Third, the record amply evidences that Respondent held a stereotypical, negative

view of minors as residents. He made the blanket assertion that children will always cause "more damage" to property than adults. Tr. 155-56. His support for this assertion is merely anecdotal. Even if children have caused damage in the past, he cannot infer that future tenants with children will do likewise. *HUD v. Sams*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,069 (HUDALJ Mar. 11, 1994), *aff'd*, 76 F.3d 375 (4th Cir. 1996).

2. The Charging Party failed to prove that Respondent violated 42 U.S.C. § 3604(c).

The Charge of Discrimination alleges that Respondent violated 42 U.S.C. § 3604(c) by "making statements to Complainants that their children necessitated payment of a higher rental amount at the subject property." Charge at ¶ 13. The Charging Party bases its claim on Ms. Kelley's recollection that during an initial meeting she overheard Respondent tell her husband that Complainants "would be paying $15 for one son." Tr. 77. This claim was not substantiated because I cannot determine whether Ms. Kelley had a true recollection of having overheard Respondent make this statement during the initial interview or whether she imagines having heard it as result of her conversation with Ms. Albrecht. Ms. Kelley testified as follows:

> Q: He made the statement to you?
> A: Yes.
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> ***
>
> A: - - that we would be paying $15 for one son . . .
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> ***
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> A: At the time we rented, *no, I wasn't for sure*.
> Q: Okay.
> A: My husband had at one time thought, *but was not for sure* that, that was the situation. We...did not become aware of it until later on that, that was the situation.

Tr. 77-78 (emphases added). She later added that she could not "recall the exact words [because it was] a very long time ago." Tr. 86.[6]

Ms. Kelley also testified that Respondent informed her that "children are very

[6]Respondent told the HUD investigator that he might tell tenants that if they had additional children, they would be subject to a surcharge. However, according to Ms. Kelley Respondent did *not* make such a statement to her or her husband:

> Q: - - did Mr. Colclasure say anything to you or your husband about an increase in rent due to the second child?
> A: No.

Tr. 85.

destructive in apartments." Assuming, without deciding, that Respondent made this statement, I do not find that it violates the Act because there is no evidence that such a statement was made in the context of discussing the rental.[7]

During the hearing and in its brief, the Charging Party contended that Respondent made another discriminatory statement to Ms. Kelly when she inquired concerning the availability and cost of renting a family-style apartment. During the course of this conversation Respondent asked, "You have two children right?" This conversation occurred after Complainants had left their apartment at 1180 North Diamond and concerned rental property at a different location.

Because this apartment was not at 1180 North Diamond Street, it is not "at the subject property" (*see supra* Charge at ¶ 13), and therefore, this purported violation was not specifically charged. However, because this statement is reasonably within the scope of the pleadings, was specifically mentioned in ¶ 9 of the Charge, and was tried by the consent of the parties, I will treat the statement as an alleged violation. *See* 24 C.F.R. § 180.425(c).

For this statement to be violative of the Act, "an ordinary listener" must naturally interpret it as indicating a preference against families with children. *See United States v. Hunter,* 459 F.2d 205, 215 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972); *see also Soules v. HUD,* 967 F.2d 817, 824 (2d Cir. 1992). An ordinary listener is "neither the most suspicious nor the most insensitive." *Ragin v. New York Times Co.,* 923 F.2d 995, 1002 (2d Cir.), *cert. denied,* 112 U.S. 81 (1991). To an ordinary listener, a simple confirmation of the number of children in a prosective tenant's family does not indicate a disinclination to rent to families or a refusal to rent to families with children.[8] *See Soules,* 967 F.2d at 824. Here this question arose after Ms. Kelley learned that Respondent would rent to families with children but that he would charge a surcharge. Accordingly, she could not have reasonably inferred from this inquiry that Respondent intended to discourage her from renting a family style apartment. At best, Respondent's statement given its context was ambiguous. Thus, the Charging Party failed to prove a violation of 42 U.S.C. § 3604(c).

Remedies

[7]In order to violate the Act, statements must be made "with respect to the sale or rental of a dwelling." 42 U.S.C. § 3604(c).

[8]Rather, the comment might indicate a housing provider's attempt to inquire into the number of residents, not children, in a unit, or to encourage a family with children to rent because of amenities for children in the complex, or any other number of nondiscriminatory reasons.

Complainants are entitled to "such relief as may be appropriate, which may include actual damages [and] injunctive and other equitable relief." 42 U.S.C. § 3612(g)(3). The Charging Party seeks the following: (1) $285 in additional rent paid by Complainants; (2) $5,000 ($2,500 for each Complainant) in emotional distress damages; (3) injunctive relief generally, with a specific prayer seeking discontinuance of the surcharge; and (4) a $5,000 civil penalty.

Compensation for the Surcharge & Emotional Distress

Complainants paid a $15 surcharge during their 19-month stay from December of 1992 until June of 1994. Accordingly, they are entitled to $285 ($15 x 19).

In addition to compensation for the surcharge, Complainants are entitled to intangible damages. *See, e.g., HUD v. Blackwell,* 908 F.2d 864, 872-73 (11th Cir. 1990). Mr. Kelley did not testify and the record is nearly devoid of any emotional distress he suffered from the discrimination. Over approximately three years, the Kelleys had "a couple" of arguments relating to this case for which I find that Mr. Kelley is entitled to $100 in relief.

Ms. Kelley testified that she fought with her husband a couple of times about this case, and that her appetite and sleep were affected for a few days. I conclude that she is entitled to only modest compensation for her distress. Respondent's acts did not cause her to seek medical or any other treatment, nor did she miss any work. Moreover, Respondent's actions did not prevent her from seeking additional rental housing from him after she and her family had left the North Diamond Street complex. For her emotional distress, I find that she is entitled to $500 in damages.

Civil Penalty

The Act provides that Respondent may be assessed a civil penalty "to vindicate the public interest." 42 U.S.C. § 3612(g)(3). Determining an appropriate penalty requires consideration of the following five factors: (1) whether Respondent has previously been adjudged to have committed unlawful housing discrimination; (2) Respondent's financial resources; (3) the degree of Respondent's culpability; (4) the nature and circumstances of the violation; and (5) the goal of deterrence. *See* House Comm. on the Judiciary, *Fair Housing Amendments Act of 1988,* H.R. Rep. No. 711, 100th Cong., 2d Sess. At 37 (1988); *HUD v. Jerrard,* 2 Fair Housing-Fair Lending at ¶ 25,092.

The record does not indicate that Respondent has been previously adjudged to

have committed unlawful discrimination. Accordingly, the maximum penalty that may be assessed is $11,000. 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 180.670(b)(3)(iii)(A)(1). Second, Respondent does not contend that he is financially unable to pay a penalty. To the contrary, the record demonstrates that he owns multiple rental housing.

Respondent is solely culpable for the surcharge. He admitted that the surcharge was his sole creation based on his rental experience. He developed and instituted the rental fees. The nature and circumstances of the violation merit a meaningful, but modest penalty. Although Respondent's violation treated families with children differently, the treatment was limited to assessment of a $15 charge to cover what he perceived as additional damage to his property from minor residents. He did not refuse to rent to families with children, limit services or amenities to them, or engage in more heinous conduct. The goal of deterrence also warrants imposition of a penalty since Respondent testified that he has not altered his rental policy. *See* tr. 132. He and other housing providers must be placed on notice that housing discrimination, in any form, will not be tolerated. After consideration of all factors, I conclude that a $2,000 civil penalty is warranted.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief. 42 U.S.C. § 3612(g)(3). Injunctive relief should be designed to eliminate the effects of past discrimination, prevent future discrimination, and make Complainants whole. *See Park View Heights Corp. V. City of Black Jack,* 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied,* 445 U.S. 905 (1980); *see also Blackwell,* 908 F.2d at 874. The injunctive provisions of the following Order serve all of these purposes.

Conclusion

The preponderance of the evidence demonstrates that Respondent Kip Colclasure discriminated against Complainants Michelle L. and Randall D. Kelley on the basis of familial status in violation of 42 U.S.C. § 3604(b) and 24 C.F.R. § 100.65. Complainants suffered actual damages for which they will be compensated. Further, to vindicate the public interest, injunctive relief will be ordered and a civil penalty will be assessed against Respondent.

ORDER

It is hereby ORDERED that:

1. Respondent Kip Colclasure is permanently enjoined from discriminating with respect to housing. Prohibited actions include, but are not limited to: discriminating against any person in the terms, conditions, or privileges of sale or rental of a dwelling because of familial status.

2. Within forty-five (45) days of the date this Order becomes final, Respondent shall discontinue his current surcharge assessments, with the exception that this Order is not intended to affect any contract, sale, encumbrance or lease consummated before issuance of this initial decision that involves a bona fide purchaser, encumbrancer or tenant without actual knowledge of the Charge, as provided by 24 C.F.R. § 180.670(b)(3)(ii).

3. Withing forty-five (45) days of the date this Order becomes final, Respondent shall pay Complainants Michelle L. and Randall D. Kelley $285 in monetary damages.

4. Within forty-five (45) days of the date this Order becomes final, Respondent shall pay Michelle L. Kelley $500 in emotional distress damages.

5. Withing forty-five (45) days of the date this Order becomes final, Respondent shall pay Randall D. Kelley $100 in emotional distress damages.

6. Within forty-five (45) days of the date this Order becomes final, Respondent shall pay a civil penalty of $2,000 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. §§ 180.670 and 180.680(b), and will become the final agency decision thirty (30) days after the date of issuance of this initial decision.

_____

WILLIAM C. CREGAR
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by William C. Cregar, Administrative Law Judge, in HUDALJ 05-95-0516-8, were sent to the following parties on this 5th day of January, 1998, in the manner indicated:

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